

Did the Navy Get **Taken**?

John Krieger



"Think. The first responsibility of the acquisition workforce is to think. We need to be true professionals who apply our

education, training and experience through analysis and creative, informed thought to address our daily decisions. Our workforce should be encouraged by leaders to think and not to automatically default to a perceived school solution just because it is expected to be approved more easily. BBP 2.0, like BBP 1.0, is not rigid dogma—it is guidance subject to professional judgment."

That was how Under Secretary of Defense for Acquisition, Technology, and Logistics Frank Kendall described the first of a set of "key overarching principles that underlie BBP [Better Buying Power]" in his April 24, 2013, memorandum to the Department of Defense (DoD). He said BBP 2.0 should be approached with those principles in mind. In his White Paper introducing Better Buying Power 3.0, Kendall continued to emphasize the vital importance of thinking, "... nothing is more important to our success than our professional ability to understand, think critically, and make sound decisions about the complex and often highly technical matters defense acquisition confronts."

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In Kendall's service, this, then, is a think piece. Although I personally loathe the phrase, it is designed to make you "think outside the box." For those of you who may not be with DoD, let me suggest that you also should be thinking.

The Deal

There was a small article in the May 8, 2014, edition of the *Navy Times* titled "Navy pays 1 cent to scrap ex-carrier *Saratoga*." The story, below, was about the Navy decommissioning the aircraft carrier *Saratoga* and negotiating a contract for scrapping the ship. Here is the article in its entirety:

The decommissioned aircraft carrier *Saratoga* is officially headed for the scrapyard after the Navy paid one penny to a Texas scrapyard to dismantle the 81,101-ton flattop that once blockaded Soviet ships during the Cuban Missile Crisis.

Saratoga will head to Brownsville, Texas, later this year for scrapping by the company ESCO Marine, Naval Sea Systems Command said in a Thursday news release.

The *Saratoga* is the second of three conventionally-powered carriers destined for scrapping. All Star Metals received the *Forrestal* earlier this year, also taking on the flattop for a penny. A third contract is pending for the *Constellation*, with International Shipbreaking Ltd.

The one-cent payment is the lowest the Navy can offer to the company to take the flattop off the fleet's hands. ESCO Marine will keep the profits from the sale of the scrap metal.

The carrier, the sixth *Saratoga* in U.S. history, was decommissioned in 1994 after 38 years in service. Despite attempts to turn it into a museum, the Navy decided in 2010 that none of the applications to turn it into a public display was up to par.

In addition to its pivotal role in the 1962 Cuban Missile Crisis, "Super Sara" was also involved in a 1986 airstrike against Libya.

The carrier is expected to make its way to Texas this summer from its current berth at Naval Station Newport, Rhode Island.

Your reaction, like the editors of the *Navy Times*, presumably, is probably, "Gosh, the Navy got a great deal on that one." After all, how much must it cost to dismantle and scrap a more than 50-year-old aircraft carrier? The costs associated with environmental issues alone must be astronomical—well, at least significant. It is a good thing for the Navy that the Courts and Boards take a rather elastic view of what constitutes adequate consideration (see below), as they will only pay ESCO Marine one cent. According to the *Government Contracts Reference Book* (Fourth Edition):

CONSIDERATION: A performance or return promise that is the inducement to a contract because it is sought by the PROMISOR in exchange for his promise and is given by the PROMISEE in exchange for that promise. Restatement (Second) Contracts

§ 71 (1981). . . . The requirement for consideration does not require that what is relied upon for consideration be equivalent in value to the promise; the consideration need only have "some value."

Based on the above, you might feel safe in presuming that the Navy negotiated a very, very good deal. You might be right. Might be.

Yard Sales

My reaction, on the other hand, was what some people might consider cynical, "Did the Navy get taken?" The key to my reaction is two sentences, "The one-cent payment is the lowest the Navy can offer to the company to take the flattop off the fleet's hands. ESCO Marine will keep the profits from the sale of the scrap metal." First, let's deal with an acquisition subtlety that is apparently lost on the article's author: ESCO Marine is the offeror; it makes the offer. In the give and take of discussions or negotiations, the Navy could have made one or more counteroffers to what ESCO Marine originally offered.

Now, let's deal with another, more important, subtlety. Even if the terminology were correct, why is one cent the lowest offer the Navy can make? Why should the Navy have paid even one red cent? (Sorry, couldn't help myself.) Consider the Saturday morning yard sale. In many instances, when we have things we don't need or want, we just toss them. When we have accumulated an excess number of items we don't want (e.g., clothes, dishes, books, DVDs) we have a number of ways to divest ourselves of them. One solution, of course, is to just throw them in the trash. If there is a lot of stuff, we may have to do this incrementally or pay to have it hauled away. If we believe there is still some residual value, we may contribute the stuff to a charity and take a deduction on our income taxes.

Another alternative, if there is residual value, is to hold a yard sale or garage sale. You are all familiar with the yard sale, where we get other people to pay us for the privilege of hauling off our unwanted goods, our junk, our trash. In some cases, those people, especially the Early Birds, will turn around and resell our stuff for a profit—if they are really keen eyed and knowledgeable, for a significant profit. Think "Antiques Roadshow" sort of profits.

Why didn't the Navy hold a "Shipyards Sale" or "Ship Yard Sale"? Instead of paying one cent for scrapping the *Saratoga*, why didn't the Navy charge the contractors for the privilege of scrapping the carrier? Think of timber contracts, where the Forest Service charges contractors for the right to cut down trees. Think of concessions contracts, where the National Park Service charges contractors for the right to run concessions on government property. Instead of allowing ESCO Marine to "keep the profits from the sale of the scrap metal," shouldn't the Navy have been trying to get back as much of that value as possible? Presumably, this acquisition was negotiated competitively. When all is said and done, All Star Metals and International Shipbreaking Ltd. were successful

offerors on similar contracts. Shouldn't the Navy have been able to use the benefits of that competition to get the best deal for the government?

(Note: Some additional money could be made by selling pieces of the *Saratoga* as souvenirs instead of scrap. I personally have souvenirs from or of several ships, including the USS *Constitution* and the USS *Constellation*.)

The USS *Constitution*

The reason for my reaction is because of a story, perhaps apocryphal, of the USS *Constitution* turnaround. For those unfamiliar with the story, we should begin with a discussion of the turnaround, which last occurred on July 4, 2014. The purpose of turning around the USS *Constitution* is to equalize wear from tidal and stream effects on both the port and starboard of the vessel. Now, according to the story, it formerly cost the Navy a bundle to turn around the *Constitution*. But then the winner of the competition started to advertise that it had won the

the fedbizopps Website turned up solicitations for repositioning and turnaround services for the USS *Constitution*, but no award announcements.

Whether or not the story of the turnaround of the USS *Constitution* is true, shouldn't we use it as an archetype in appropriate circumstances? I contend that is what a thinking member of the acquisition workforce would do. That is exactly what Kendall would want us to do in discussing the role of the Acquisition Team in the "Guiding Principles" of the Federal Acquisition Regulation (FAR). Leeway is needed to take an expanded view of what can be accomplished by thinking critically, FAR 1.102-4(e):

The FAR outlines procurement policies and procedures that are used by members of the Acquisition Team. If a policy or procedure, or a particular strategy or practice, is in the best interest of the Government and is not specifically addressed in the FAR, nor prohibited by law (statute or case law), Executive order or


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contract. In the next competition, the competitor significantly undercut the incumbent, thus winning the "bragging rights." The downward spiral continued until one year the winning offer was, amazingly, just \$1. However, the story then turns truly amazing, because in the next competition the Navy was paid for the rights to turn around the *Constitution*, sort of like on a concessions contract. The next contract brought the Navy even more money. Unfortunately, I have been unable to verify this story, although I went to a considerable effort—well, at least a moderate effort.

My attempt to verify the story began in what I consider an easy way, I asked my oldest brother. This was done for two reasons: He lives in the Boston area and he has been involved in acquisition much longer than I. He told me there had been no stories in the *Boston Globe*, even though it was time to turn around the ship. He indicated he had heard the same story when he was in acquisition training. I tried to verify the story with the USS *Constitution* Museum, which could not do so, but, referred me to the U.S. Navy's Public Affairs Officer for the USS *Constitution*. He was unable to verify the story, but referred me to the fiscal officer for NHHHC (i.e., Naval History and Heritage Command) Detachment Boston. As of publication date, there has been no response from NHHHC. My search of

other regulation, Government members of the Team should not assume it is prohibited. Rather, absence of direction should be interpreted as permitting the Team to innovate and use sound business judgment that is otherwise consistent with law and within the limits of their authority. Contracting officers should take the lead in encouraging business process innovations and ensuring that business decisions are sound.

Admittedly, that is not totally opening the floodgates. The Acquisition Team does have to follow the law, which is our box. After all, as Charles Laughton said as Inspector Javert, the icy policeman in the classic 1935 film adaptation of "Les Misérables": "Right or wrong, the law is the law and it must be obeyed to the letter." But, if the Acquisition Team thinks critically, and takes innovative approaches to what may seem mundane or routine matters, we can help to achieve Better Buying Power.

One last thought: If the Navy got taken in the ESCO Marine negotiation, it also got taken in All Star Metals and International Shipbreaking Ltd. negotiations, other acquisitions negotiated for one cent. 

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